**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DAVID HULSE** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 219,937 |
| **NATIONAL BEEF PACKING COMPANY, L.P.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **WAUSAU INSURANCE COMPANIES** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals from a March 17, 1997, preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson.

## ISSUES

The Administrative Law Judge denied claimant's request for preliminary benefits, finding claimant had failed to prove that the condition he complained of arose out of and in the course of his employment with respondent. The Administrative Law Judge further found that claimant had not met his burden of proving that his injury was due to a work-related accident.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review findings regarding disputed issues of whether the employee suffered an accidental injury and whether the injury arose out of and in the course of the employee's employment. *See* K.S.A. 1996 Supp. 44-534a(a)(2).

Claimant began working for respondent in October of 1996. His work involved pushing and pulling halves of beef and separating them onto rails. The floor was often wet and fat would accumulate making the floor slick. Claimant testified he slipped and fell from time to time. However, he did not perceive any of those falls to have produced his injury at the time and, therefore, did not contemporaneously report an accident. In fact, claimant never reported the back injury as work related during the time he was working for respondent.

Toward the end of 1996, claimant began experiencing pain in his hip and leg. The pain worsened to the point where, as of January 6, 1997, claimant was unable to continue working. At the time of the March 5, 1997, preliminary hearing, claimant had not returned to work.

Claimant sought medical treatment on his own and was referred by his physician to an orthopedic surgeon, Guillermo Garcia, M.D. At the time of his first visit to Dr. Garcia on January 23, 1997, claimant was still not relating his back, hip, and leg condition to an injury on the job. He did not indicate a job-related injury on the new patient questionnaire at Dr. Garcia's office. There is a dispute as to what prompted claimant to attribute his condition to his work. Claimant's counsel contends that it was Dr. Garcia who, after listening to claimant's description of his work, first suggested to claimant that his work activities and the falls that he took at work were a likely explanation for his symptoms. Respondent's counsel, on the other hand, argues that it was not until after claimant's attorney wrote to Dr. Garcia suggesting the injury occurred at work that the notion of a work-related injury found its way into Dr. Garcia's records. Whichever scenario is correct, Dr. Garcia was unwilling to give a medical opinion that claimant's condition was more probably than not caused by claimant's work activities. Dr. Garcia was asked repeatedly at his deposition concerning the relationship of claimant's herniated disc to his work. As to each such question, Dr. Garcia consistently replied that such a relationship was certainly a possibility, but he would never state it as a probability.

Claimant does not know what caused his injury. He cannot identify any specific incident as a precipitating event to his hip and leg pain. Claimant argues that the cumulative effect of his job, together with the numerous or several slips and falls he sustained, were the most likely cause of his condition. However, Dr. Garcia, the doctor to whom claimant attributes the origin of this theory that, absent some other explanation, the work must have caused his injury, refused to relate claimant's herniated disc to his work other than as a "possibility."

In proceedings under the workers compensation act, claimant bears the burden of proof to establish his right to an award of compensation and to prove the various conditions

on which the claimant's right depends. K.S.A. 1996 Supp. 44-501(a). "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true . . . ." K.S.A. 1996 Supp. 44-508(g).

When determining whether claimant has satisfied this burden of proof, the trier of fact must consider the entire record. When so doing, the Appeals Board agrees with the finding by the Administrative Law Judge that claimant has failed to sustain his burden of proof that he suffered injury by accident arising out of and in the course of his employment with respondent. Therefore, benefits should be denied.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson dated March 17, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of June 1997.

BOARD MEMBER

c: Henry A. Goertz, Dodge City, KS
D. Shane Bangerter, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director